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In the Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 848, 849, 850

LEE YOUNG, LEE DEER, AND RALPH L. POLK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and concurring opinions in the circuit court of appeals (R. 548-556) have not yet been reported.

JURISDICTION

The judgments of the circuit court of appeals were entered May 11, 1948 (R. 557-558). The petition for a writ of certiorari was filed June 7, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as

amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether evidence that the jury may have erroneously reported convictions on particular counts in the mistaken belief that such counts charged the offenses of which it intended to find petitioners guilty, requires the granting of a new trial, where no attempt was made to secure a correction of the record, and where the convictions based on the reported verdicts have been held, on appeal, to be supported by the evidence.

STATEMENT

Petitioners and others were tried on a five-count indictment returned against them in the United States District Court for the District of Kansas (R. 2-10). The first count charged a conspiracy to violate the liquor laws; the second, the carrying on of the business of a liquor dealer without paying the tax required by law (26 U.S.C. 3253); the third, the purchase of distilled spirits from a person other than an authorized rectifier (26 U.S.C. 2860); the fourth, failure to keep records (26 U.S.C. 2857); and the fifth, failure to keep a sign posted (26 U.S.C. 2831). On January 24, 1947, the jury returned verdicts finding petitioner Deer guilty on counts 1, 2, 3 and 5 (R. 18), petitioner Young guilty on counts 1, 3 and 4 (R. 19-20), and petitioner Polk guilty on counts 2 and 5 (R. 19). Young's and Deer's motions for acquittal and in

arrest of judgment (R. 23-25) were granted as to count 3 (R. 26-27). On February 6, 1947, motions for a new trial (R. 21-23) were denied as to all petitioners (R. 25), sentences were imposed (R. 26-30), and appeals noted (R. 30-33).

Subsequently, petitioners moved the district court to request the circuit court of appeals to remand the cause for further proceedings on their motions for a new trial to enable them to present newly discovered evidence that the jurors had made a mistake in their verdict (252, R. 1-11).[1] The district court declined to act on the motion on the ground that the cause was pending in the circuit court of appeals (252, R. 11-13).

Petitioners then filed in the circuit court of appeals separate motions to remand the cause for further proceedings on their motions for a new trial (252, R. 13-15, 30-32, 35-37). Petitioners Young and Polk attached to their motions affidavits by each of the jurors to the effect that all of them intended to convict Polk of conspiracy and acquit him of selling liquor without a license, and to convict Young of selling liquor without a license and acquit him of conspiracy, but that, as a result of their confusion with respect to the offenses charged in the particular counts, they had erroneously reported a verdict of guilty against Polk

[1] A petition for a writ of certiorari was filed in this Court to review the circuit court of appeals' denial of the motions to remand, No. 252, this Term. We have designated the record in that case "252, R." The material in that record is not reprinted in the present record (cf. R. 1, 528).

for selling whiskey and against Young for conspiracy (252, R. 16-30, 37-52). The circuit court of appeals denied the motion to remand (252, R. 57). As to the affidavits presented by Polk and Young that the verdict reported was the result of a mistake, the circuit court of appeals ruled that such error, if established, could be corrected, but that it did not justify the granting of a new trial. Since petitioners were seeking a new trial rather than correction of the verdict, the court declined to remand the cause for such purpose (163 F. 2d 187, 189-190).

Petitioners filed a petition for certiorari to have this Court review the circuit court of appeals' denial of their motion for remand. The petition was denied on October 13, 1947 (332 U. S. 770). Thereupon the parties proceeded with the appeals theretofore filed, which, by order of the circuit court of appeals (252, R. 57-58), had been held in abeyance pending the disposition of the first petition for a writ of certiorari. On appeal, the court affirmed the judgments of conviction (R. 557-558). It reviewed the evidence and held that it was sufficient to support the verdicts rendered (R. 549-553) and that the verdicts were not subject to being set aside for alleged inconsistencies (R. 553-554). Petitioners do not challenge or in any manner question the court's holdings on this phase of the case. The court below further reaffirmed its earlier opinion that petitioners were not entitled to a new trial because of the alleged mistake

of the jury in returning their verdicts (R. 554-555). In a concurring opinion, Judge Phillips stated his adherence to the court's original opinion on denying the motion for remand (163 F. 2d 187) and made more explicit his view that the alleged error of the jury did not entitle petitioners to a new trial, but that their proper remedy, which they had not pursued, was, as indicated in the court's first opinion, by way of a motion for correction of the verdicts (R. 555-556).

ARGUMENT

The present petition is merely an attempt to have this Court pass on precisely the same issue which was presented to it in case No. 252. That this is so can be seen most readily from a comparison of the questions presented which petitioners have set forth in the two petitions. The instant petition states the only question presented as (Pet. 8):

> In a criminal case, where a jury through mistake convicts a defendant of a count in the indictment upon which it intended to acquit him and the error is not detected until 28 days after the jury has been discharged, should the error be corrected by granting a new trial or must the defendant be sentenced under the mistaken verdict if he fails to request the court to reform it to express conviction on the count on which the jury intended to find him guilty?

The questions set forth in the petition in case No. 252 (p. 4) included:

> 2. In a criminal case, can the trial court correct or reform a mistaken verdict 28 days

after the jury has been discharged, by means other than granting a new trial?

3. Must an accused, who has been inadvertently convicted (error discovered 28 days after jury discharged) by a jury on a count in an indictment of which they intended to acquit him, submit to the trial court entering a verdict of guilty on another count of the same indictment, on which the jury inadvertently acquitted him, or be denied a new trial without contravening the rights afforded him by the Fifth, Sixth and Fourteenth amendments to the Constitution of the United States?

Our position on the issue sought to be raised by petitioners is set forth in our brief in opposition in case No. 252 (pp. 4-5). This Court has once declined to review the circuit court of appeals' ruling on this issue, and the present petition presents no new argument or authority warranting a reversal of the Court's action.

Petitioners first sought to secure a new trial on the basis of their allegation that the jury had convicted two of them [2] on counts on which they intended to acquit them. Failing in this effort to secure a new trial, petitioners, without making any attempt to correct the allegedly erroneous ver-

[2] Petitioners presented no evidence that the verdict entered against petitioner Deer was the result of any mistake. It is simply argued that since the verdicts as to petitioners Young and Polk were the result of inadvertent error on the part of the jury, "It follows as a matter of logic that the jury made the same mistake in arriving at its verdict on the charges preferred against Lee Deer." (Pet. 16) Cf. note 1, p. 4, of our brief in opposition in case No. 252.

dicts, tried again, and at the same time sought reversal of the convictions on the grounds that the verdicts were not supported by the evidence, and that they were inconsistent. The circuit court of appeals, held, however, that the verdicts actually returned were supported by the evidence and were not subject to being set aside for inconsistency. Petitioners do not contest these holdings. Their failure to seek correction of the verdicts may well have been motivated by a considered opinion that their chances of securing a reversal of the convictions on the allegedly erroneous verdicts were better than they would be if the verdicts entered were corrected to conform to the alleged intention of the jury.[3] Clearly, petitioners' seeking formal correction of the verdicts to conform to the intention of the jury would not have precluded their attacking the convictions on appeal, as contended by them (Pet. 19, 29).

CONCLUSION

Petitioners have adduced no reason for now reviewing the circuit court of appeals' refusal to remand the case for a new trial, which action this Court declined to review in case No. 252. We

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[3] Young was sentenced to two years' imprisonment on count 1, conspiracy (R. 29). This sentence would have been authorized on conviction under count 2, carrying on the business of a liquor dealer without paying the tax required by law, on which count it is said the jury intended to convict him. Similarly, Polk's sentence of two years' imprisonment and payment of a fine of $5,000 on count 2 (R. 28) would have been authorized under count 1.

therefore respectfully submit that the petition for a writ of certiorari should be denied.

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